Legislative Summary LS-441E

BILL C-2: THE YUKON ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT ACT

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Legislative history by Peter Niemczak

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BILL C-2: THE YUKON ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT ACT*

On 3 October 2002, the Honourable Robert D. Nault, Minister of Indian Affairs and Northern Development, introduced Bill C-2, the Yukon Environmental and Socio-economic Assessment Act. The purpose of Bill C-2 is to give effect to the development assessment provisions in Chapter 12 of the *Umbrella Final Agreement* (the "Agreement"), signed on 29 May 1993 by the Government of Canada, the Council for Yukon Indians and the Government of the Yukon.

Under the terms of article 12.3 of the Agreement, the Government of Canada undertook to implement a development assessment process and to recommend to Parliament development assessment legislation consistent with Chapter 12 no later than two years after the effective date of settlement legislation. The *Yukon First Nations Land Claims Settlement Act* came into force on 14 February 1995.

The Government of Canada has worked with the Yukon First Nations and the Yukon territorial government since 1996 to develop the development assessment legislation intended to create a process which would assess both the environmental and the socio-economic impacts of development activities in Yukon. A first draft of the legislation was released in 1998 for public review. Comments received led to a second draft, released on 2 August 2001 and followed by another round of consultations through November 2001. Bill C-2, introduced on 3 October 2002, is the result of these extensive consultations.

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* Notice: For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

BACKGROUND

A. The Yukon First Nations

The Yukon First Nations are said to have migrated from Siberia and Alaska about 15,000 years ago. There are fourteen First Nations[1] who traditionally lived in small groups, by hunting, fishing and trapping in the bush. In the late nineteenth century, the Klondike Gold Discovery brought thousands of prospectors into Yukon and changed the Indian way of life. In the twentieth century, Yukon First Nations were further affected by a number of events: the Residential School system, the construction of the Alaska Highway, the development of Band lists and Indian villages by the Department of Indian Affairs, the disappearance of the river steamers – to which they sold wood – when the Dawson Highway was opened, and mining. By 1973, they feared the consequences of the Alaska oil pipeline.

B. The Comprehensive Claim

In 1968, the First Nations founded the Yukon Native Brotherhood (the "YNB") to start preparing a land claim to be presented to the Government of Canada. In 1973, the YNB presented a statement of grievances and suggestions for a settlement on behalf of the Yukon First Nations: *Together Today for our Children Tomorrow*. The claim was based on the Aboriginal rights of the First Nations and aimed at greater participation in the development of Yukon, as well as the protection of lands, values, culture and lifestyle. The claim was accepted for negotiation in 1973.

The First Nations created the Council for Yukon Indians (the "CYI") in 1973 to represent the fourteen Yukon bands for the purpose of negotiating the claim.[2] Initially, the negotiations took place between the CYI and the federal government. However, the Government of Yukon joined the process in 1979.

In 1984, an Agreement-In-Principle was reached, but it was rejected by the General Assembly of the CYI. Shortly thereafter, the federal government suspended the negotiations. They resumed in January 1986, shortly before the announcement of the federal

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(1) Sixteen are listed on the Internet site of the Department of Indian Affairs, but they include two First Nations whose territories are partly in British Columbia: Dease River and Taku River Tlingit.

(2) The Council currently represents eleven First Nations. The following three are no longer members: Kwanlin Dun First Nation and Liard River and Ross River, which are members of the Kaska Tribal Council.

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government's Comprehensive Land Claims Policy. A new mandate for the negotiation of the Yukon claim in 1987 provided for the negotiation of an Agreement-In-Principle on territory-wide issues. This would form the basis for umbrella settlement legislation allowing individual First Nations to adhere after negotiating band-specific issues. The Agreement-In-Principle was signed in 1988. On 29 May 1993, the Government of Canada, the Government of Yukon and the Council for Yukon Indians signed an umbrella final agreement.

C. The *Umbrella Final Agreement*

The *Umbrella Final Agreement* did not create or affect any legal rights (s. 2.1.2). It was a political agreement signifying the mutual intention of the Council for Yukon Indians and the Government of Canada to negotiate (s. 2.1.1), and setting the framework within which to negotiate final land claim and self-government agreements within the meaning of section 35 of the *Constitution Act, 1982* with each of the Yukon First Nations (s. 2.2.1). However, it should be noted that the provisions of the *Umbrella Final Agreement* have all been included in the Yukon First Nations' final agreements implemented to date.

Thus, the *Umbrella Final Agreement* allocated approximately 42,000 square kilometres of land to be shared by the fourteen First Nations[3] and provided how much land each First Nation would retain under the settlement.[4] In addition, it provided how the land would be selected, and the extent of the rights to be held on the settlement land, according to the various categories of land, as well as the scope of management powers over the lands for the Yukon First Nations. It set out the rules regarding expropriation of settlement land for development purposes and the compensation of the First Nations concerned. It provided for the identification of special management areas such as national wildlife areas, national parks and designated heritage sites where the First Nations would benefit from harvesting rights and economic and employment opportunities. It called for the creation of a land use planning process. An entire chapter of the *Umbrella Final Agreement* is devoted to the promotion and the protection of the culture and heritage of the Yukon First Nations. It set out how water, fish and wildlife would be managed.

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(3) *Umbrella Final Agreement Between the Government of Canada, the Council of Yukon Indians and the Government of the Yukon*, s. 9.2.1.

(4) *Ibid.*, Schedule A to Chapter 9.

The *Umbrella Final Agreement* also set out the scope and content of the consultations with the First Nations:

> "Consult" or "Consultation" means to provide:
>
> a. to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter;
> b. a reasonable period of time in which the party to be consulted may prepare its view on the matter, and an opportunity to present such views to the party obliged to consult; and
> c. full and fair consideration by the party obliged to consult of any views presented.

In addition, the *Umbrella Final Agreement* provided for Transboundary Agreements for First Nations such as the Teslin Tlingit Council and the Kaska Dena Nation, who claimed that their territories extend outside Yukon.

The *Umbrella Final Agreement* provided that "the enactment of valid Settlement Legislation shall be a condition precedent to the validity of Settlement Agreements which are ratified at the same time the *Umbrella Final Agreement* is ratified."[5] Consequently, Parliament enacted the *Yukon First Nations Land Claims Settlement Act*,[6] which came into force on 14 February 1995. In addition, the *Yukon First Nations Self-Government Act*[7] was enacted to give effect to the self-government agreements entered into by the Yukon First Nations. It also came into force on 14 February 1995.

Of particular interest in the present case is Chapter 12 of the *Umbrella Final Agreement* providing for a development assessment process, which is discussed further below.

It should be noted that "government" means Canada or Yukon, or both, depending upon which government or governments have responsibility for the matter in question.

1. The First Nations Covered by the *Umbrella Final Agreement*

Fourteen First Nations are parties to the *Umbrella Final Agreement*. They are:

- Carcross/Tagish First Nation
- Champagne and Aishihik First Nations

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(5) S. 2.2.11.

(6) 1994, c. 34.

(7) 1994, c. 35.

- Dawson First Nation, now known as Tr'ondëk Hwëch'in
- Kluane First Nation
- Kwanlin Dun First Nation
- Liard First Nation
- Little Salmon/Carmacks First Nation
- First Nation of Nacho Nyak Dun
- Ross River Dena Council
- Selkirk First Nation
- Ta'an Kwäch'än Council
- Teslin Tlingit Council
- Vuntut Gwitchin First Nation
- White River First Nation

2. The First Nations with Final and Self-Government Agreements under the *Umbrella Final Agreement*

The following eight First Nations also signed Final Agreements and Self-Government Agreements:

- First Nation of Nacho Nyak Dun (1993)
- Champagne-Aishihik First Nations (1993)
- Vuntut Gwitchin First Nation (1993)
- Teslin Tlingit Council (1993)
- Little Salmon/Carmacks First Nation (1997)
- Selkirk First Nation (1997)
- Tr'ondëk Hwëch'in First Nation (1998)
- Ta'an Kwäch'än Council (2002)

In March 2002, negotiations were conducted with the other six Yukon First Nations:

- Carcross/Tagish First Nation
- Kluane First Nation
- Kwanlin Dun First Nation
- Liard First Nation
- Ross River Dena Council
- White River First Nation

The Carcross/Tagish, Kluane, Kwanlin Dun and White River First Nations are currently finalizing their Final and Self-Government Agreements and are expected to conduct a ratification vote by 31 March 2003.

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3. Chapter 12 – Development Assessment

Chapter 12 of the *Umbrella Final Agreement* provided for a development assessment process which, under the terms of section 12.1.1, would meet the following criteria:

- recognize and enhance, to the extent practicable, the traditional economy of Yukon Indian People and their special relationship with the wilderness environment;
- provide for guaranteed participation by Yukon Indian People and utilize the knowledge and experience of Yukon Indian People in the development assessment process;
- protect and promote the well-being of Yukon Indian People and of their communities and of other Yukon residents and the interests of other Canadians;
- protect and maintain environmental quality and ensure that projects are undertaken consistent with the principle of sustainable development;
- protect and maintain heritage resources;
- provide for a comprehensive and timely review of the environmental and socio-economic effects of any project before it is approved;
- avoid duplication in the review process for projects and, to the greatest extent practicable, provide certainty to all affected parties and project proponents with respect to procedures, information requirements, time requirements and costs; and
- require project proponents to consider the environmental and socio-economic effects of projects and project alternatives and to incorporate appropriate mitigating measures in the design of projects.

Section 12.3.4 provides that "Government shall recommend to Parliament ... the Development Assessment Legislation consistent with this chapter as soon as practicable and in any event no later than two years after the effective date of Settlement Legislation." As noted above, the Settlement Legislation came into force on 14 February 1995. The Development Assessment Legislation is therefore overdue.

The following matters are subject to review under the development assessment process (s. 12.4.1):

- new projects to be undertaken in Yukon, which are not exempt from screening and review;

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- significant changes to existing projects. An "existing project" means an enterprise or activity or class of enterprise or activity which has been undertaken or completed in Yukon and which is not exempt from screening and review;

- enterprises or activities located outside Yukon with significant adverse environmental or socio-economic effects in Yukon;

- temporary shutdown, abandonment or decommissioning of an existing project;

- plans, meaning a plan, program, policy or proposal that is not a project;

- existing projects;

- development assessment research;

- studies of environmental or socio-economic effects that are cumulative regionally over time.

The *Umbrella Final Agreement* provides that the assessment of the environmental and socio-economic effects of projects can be done through screening, review by an assessment body and public review. The differences between the three types of review should be explained in the Development Assessment Legislation.

a. Assessment Bodies

There are to be three types of assessment bodies established under the Development Assessment Legislation: "Designated Offices," the Executive Committee of the Yukon Development Assessment Board and Panels.

1) Designated Office

A Designated Office is defined in the *Umbrella Final Agreement* as a community or regional office of Government, an office of a Yukon First Nation or another office identified pursuant to the Development Assessment Legislation in accordance with Yukon First Nation Final Agreements and for the purposes set out in section 12.6.0 of the *Umbrella Final Agreement*.

The Designated Office will screen projects and determine the information to be provided by the person responsible for the project, as well as ensure that Yukon First Nations and interested parties are able to participate. The Designated Office will make recommendations

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as to whether a given project should be allowed to proceed and, as the case may be, subject to what terms. It will also be able to recommend that a given project be monitored.

2) The Yukon Development Assessment Board

The Development Assessment Legislation must establish the Yukon Development Assessment Board (the "Assessment Board"). Through its Executive Committee, the Assessment Board will ensure that the screening and review of projects are conducted, and will make recommendations to a "Decision Body." The Executive Committee of the Board will be composed of one member nominated by the Council of Yukon Indians, one member nominated by Government and a Chairperson appointed by the Minister. Half of the remaining members of the Yukon Development Assessment Board, to be determined in the Development Assessment Legislation, are to be nominated by the Council for Yukon Indians and the other half by Government.

The composition of the Board is subject to the criteria set out under section 2.12.1 of the *Umbrella Final Agreement*, unless otherwise provided in a Settlement Agreement:

> 2.12.2.1 a majority of the members nominated by Yukon First Nations or the Council for Yukon Indians, as the case may be, and a majority of the members nominated by Government shall be residents of the Yukon;
>
> 2.12.2.2 the Council for Yukon Indians or Yukon First Nations, as the case may be, and Government, shall put forward their nominees within 60 days of a request by the Minister;
>
> 2.12.2.3 appointments of Government nominees shall be made by the Minister as soon as practicable;
>
> 2.12.2.4 the Minister shall appoint as soon as practicable those persons nominated by Yukon First Nations or the Council for Yukon Indians, as the case may be;
>
> [...]
>
> 2.12.2.11 appointments to a Board shall be for a three year term except that the term of initial appointments to a Board may, in the discretion of the nominating party, be less than but not exceed three years and any appointment replacing a member whose term has not expired shall only be for the unexpired portion of that term; and

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2.12.2.12 members of Boards shall not be delegates of the parties who nominate or appoint them.

Upon request from the Government or, with the consent of Government, upon request from a First Nation, the Board shall:

- conduct reviews, including reviews of shutdown, abandonment, decommissioning or significant changes.
- conduct an audit or monitor effects of a project or an existing project.

It may:

- review a plan which may have negative environmental or socio-economic effects in Yukon (s. 12.8.1.5).
- undertake studies of cumulative effects of projects in a specific area or over time, also upon request from the Government or, with the consent of Government, upon request from a First Nation (s. 12.8.1.8).
- review enterprises or activities outside Yukon which have significant adverse environmental or socio-economic effects on Yukon (s. 12.8.1.9).

However, in all three of these cases, the review can be undertaken without the consent of Government but at the expense of the Yukon First Nation requesting it (s. 12.8.1.10). Government and Yukon First Nations may request a public review, in which case the Executive Committee will establish a Panel.

Before exercising its functions relating to the review or screening of a project, the Executive Committee shall, in accordance with the Development Assessment Legislation, make sure that the project proponent has consulted with the affected communities (s. 12.9.1).

In addition, when carrying out their functions, both the Yukon Development Assessment Board and the Designated Office have to consider the following:

- the need to protect the special relationship between Yukon Indian People and the Yukon wilderness environment;
- the need to protect the cultures, traditions, health and lifestyles of Yukon Indian People and of other residents of Yukon;

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- the need to protect the rights of Yukon Indian People under the settlement final agreements;

- the interests of Yukon residents and Canadian residents outside Yukon;

- alternatives to projects that avoid or minimize significant adverse effects and, as the case may be, measures of mitigation and compensation;

- any significant adverse effect on heritage resources. Heritage resources include non-documentary works, structures and objects, man-made or natural, that are of scientific or cultural value for their archaeological, palaeontological, ethnological, prehistoric, historic or aesthetic features. They also include heritage sites and documentary heritage resources;

- the need for a timely review of the project;

- the need to avoid duplication of procedures and provide certainty to all affected parties with respect to procedures, information and time requirements, and costs.

Once a project has been reviewed by the Yukon Development Assessment Board, the Executive Committee of the Board will make recommendations as to whether the project should be allowed to proceed and, if necessary, under what conditions.

3) Panel

The review of large projects will be carried out by panels. The Executive Committee will direct that a project be reviewed by a panel in the following circumstances (s. 12.9.2):

- the project may have significant environmental or socio-economic impacts, whether it is in or outside Yukon (s. 12.9.2.1);

- the project is likely to cause significant concern in Yukon (s. 12.9.2.2);

- the project involves technology which is controversial in Yukon or for which the effects are unknown (s. 12.9.2.3);

- the project may contribute significantly to cumulative adverse environmental or socio-economic effects in Yukon, while not generating such effects by itself (s. 12.9.2.4).

In addition, the Executive Committee shall establish a panel to conduct a public review in the following circumstances:

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- where a decision body rejects the Executive Committee's recommendation that a project not be publicly reviewed by a panel (s. 12.9.3.1);

- when Government or a Yukon First Nation has requested a public review (s. 12.9.3.2).

The Executive Committee will determine whether the effects of a project are primarily on settlement land or non-settlement land. If the effects are primarily on settlement land, two-thirds of the panel will be composed of members nominated to the Yukon Development Assessment Board by the Council for Yukon Indians and one-third will be nominated by Government. If the effects are primarily on non-settlement land, the composition of the panel is reversed. If the effects are on both settlement and non-settlement land but not primarily on either of them, the Council for Yukon Indians and Government will each nominate half the members of the panel.

The Executive Committee will establish terms of reference and appoint a chairperson for the panel. The procedure to be followed by panels will be set out in the Development Assessment Legislation.[8]

With respect to public reviews, under the *Umbrella Final Agreement* the Development Assessment Legislation is to provide for the avoidance of duplication by the Yukon Development Assessment Board and a federal environmental assessment panel, or by the Yukon Development Assessment Board and the Inuvialuit Environmental Impact Review Board, either by requiring a public review by only one of those bodies or a joint public review. However, consent of the Yukon First Nation concerned will be required if the review is to be conducted by a federal environmental assessment panel rather than by the Yukon Development Assessment Board.

b. The Decision Bodies

Upon completion of the review by Yukon Development Assessment Board or by a panel, written reports and recommendations are made to a "decision body."

The decision body may be Government, a Yukon First Nation or both, according to the provisions of section 12.13 of the *Umbrella Final Agreement*. Essentially, if the project is located even partially on settlement land, the concerned Yukon First Nation will be the decision body unless the project involves the "Right to Work Mines and Minerals" on Category B

(8) S. 12.11.0 – 12.11.1.4.

settlement land or Government authorization is specifically required, in which case both will be "decision bodies" and they will consult each other before issuing a decision document. On the other hand, where a project is located wholly or partially on non-settlement land, the decision body will be Government.

The decision body may accept the recommendations, reject them in writing with reasons or refer them back to the Yukon Development Assessment Board for further consideration. However, the *Umbrella Final Agreement* circumscribes the discretion of the decision bodies to reject or vary the terms and conditions contained in the recommendations made by the Yukon Development Assessment Board. The decision body may reject or vary the terms and conditions contained in the recommendations only in the following circumstances:

- any of the terms and conditions are insufficient to achieve an acceptable level of environmental and socio-economic impacts in Yukon;
- any of the terms and conditions are more onerous than necessary to achieve an acceptable level of environmental and socio-economic impacts in Yukon; or
- any of the terms and conditions are so onerous as to undermine the economic viability of a project.

c. Monitoring and Enforcement

The Development Assessment Legislation may provide for the enforcement of decision documents. Violation of the terms and conditions of a decision documents may cause the Yukon Development Assessment Board to recommend that a public hearing be held.

d. Transboundary Impacts

In consultation with Yukon First Nations, Government must try to negotiate with neighbouring jurisdictions agreements or cooperative arrangements providing for similar development assessments for activities outside Yukon which may have significant impacts in Yukon.

Representation of First Nations claiming overlapping territories on the Yukon Development Assessment Board shall be established in transboundary agreements.

Prior to the enactment of Development Assessment Legislation, the parties to the *Umbrella Final Agreement* shall make best efforts to resolve any conflict and avoid any duplication, in North Yukon, between the development assessment process under Chapter 12 of

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the *Umbrella Final Agreement* and the environmental screening and review process under the *Inuvialuit Final Agreement*.

e. Land Use Planning

Under Chapter 11 of the *Umbrella Final Agreement*, the Land Use Planning Policy Advisory Committee established under the 1987 *Agreement on Land Use Planning in the Yukon* was terminated on the effective date of Settlement Legislation (14 February 1995) and replaced by the Yukon Land Use Planning Council. In addition, Chapter 11 provided that Government and any affected Yukon First Nation may agree to establish Regional Land Use Planning Commissions to develop regional land use plans.

Where a regional land use plan is in effect, Chapter 12 of the *Umbrella Final Agreement* provides that the Yukon Development Assessment Board or the Designated Office shall request that the Regional Land Use Planning Commission determine whether a project is compatible with the approved regional land use plan.

The *Umbrella Final Agreement* refers to the possibility of variances between a project and a regional land use plan or the amendment of the plan, and the relationship between the grant of such variances and the issuance of a Decision Document for a project not assessed by the Yukon Development Assessment Board will have to be set out in the Development Assessment Legislation.

1) Funding

Each designated office shall prepare a budget on the basis of its responsibilities under the Development Assessment Legislation and Chapter 12 of the *Umbrella Final Agreement*. It shall submit that budget either to Government or to the Yukon Development Assessment Board, whichever is designated by Government from time to time.

The Yukon Development Assessment Board shall prepare an annual budget for its responsibilities and those of the designated offices, to be reviewed and approved by Government.

2) Implementation

Under section 12.19.1 of the *Umbrella Final Agreement*, Government, in consultation with the Yukon First Nations, will plan and implement Development Assessment Legislation and provide for its application until Yukon First Nation Final Agreements have been

negotiated. As noted earlier, eight First Nations have Final Agreements, and four more are expected to have Final Agreements by 31 March 2003. All the existing Final Agreements have a chapter on Development Assessment which is identical to Chapter 12 of the *Umbrella Final Agreement*. Therefore, the present overview of Chapter 12 is indicative of the content of the individual Final Agreements in this respect.

Development Assessment Legislation may provide the following:

- criteria for classification of projects for the determination of the entry point to the development assessment process;
- classification of projects for which screening and review by the Yukon Development Assessment Board is mandatory;
- criteria to determine the significance of adverse environmental or socio-economic effects;
- the type of plan which the Yukon Development Assessment Board may review without a request by Government or Yukon First Nations;
- criteria for the classes of enterprises or activities which are exempt from screening and review;
- the role of the Yukon Development Assessment Board, Yukon First Nations, Government, project proponents or other participants in the provision of participant funding in reviews of projects;
- the ability of the Minister to identify a designated office for a type of project;
- the manner in which a designated office conducts a review;
- time limits for activities or functions of the Yukon Development Assessment Board, designated offices, the Minister and Yukon First Nations;
- procedural requirements for project proponents and other participants;
- public participation in the review of projects;
- the process for joint reviews by the Yukon Development Assessment Board and other bodies;
- a listing of independent regulatory agencies;
- conditions respecting the provision of financial assistance to a proponent prior to assessment of a project; and
- any other matter required to implement the development assessment process.

The *Umbrella Final Agreement* also provides that the development assessment process is to be reviewed five years after the enactment of Development Assessment Legislation.

BILL C-2: DESCRIPTION AND ANALYSIS

Bill C-2 contains 134 clauses and is divided into three parts. Part 1 (clauses 8 to 39) essentially deals with the creation of the Yukon Environmental and Socio-economic Assessment Board, the assessment districts and designated offices. Part 2 (clauses 40 to 123) sets out the assessment process and related matters. Part 3 (clauses 124 to 134) contains transitional measures, consequential and coordinating amendments, and specifies when the legislation is to come into force.

Clauses 1 and 2: Short Title and Definitions

Clause 1 sets out the legislation's short title, the *Yukon Environmental and Socio-economic Assessment Act*.

Clause 2(1) defines many of the words and terms used in the bill. Notably, it defines such key terms as "First Nation," "assessment," "project," "existing project," "plan," "heritage resource," "traditional knowledge," "decision body" and "effects monitoring." Note that under coordinating amendments in clause 133, changes would be made to the following definitions in the bill: "authorization," "federal agency," "settlement land," "territorial agency" and "Yukon," in the circumstances specified in that clause.

The "federal minister" plays a pre-eminent role in the bill. Under clause 2(1), the "federal minister" is defined as the Minister of Indian Affairs and Northern Development, unless another minister is designated by the Governor in Council for the purposes of the Act. Because the federal Minister of the Environment also plays a role under the bill, the "federal minister" will henceforth be referred to as the "DIAND Minister" to avoid confusion between the two.

Clause 2(1) defines "Council" as the Council for Yukon Indians or any successor to it or, in the absence of a successor, the First Nations named in the schedule to the *Yukon First Nations Land Claims Settlement Act*. The Council for Yukon Indians has changed its name to the Council of Yukon First Nations. In the circumstance, reference will henceforth be made to the Council's new name.

Clause 3: Consultation

Where the bill calls for consultation to take place, clause 3 provides that the duty to consult shall be exercised by providing the party to be consulted with:

- notice of the matter in sufficient form and detail to enable it to prepare views on the matter;
- reasonable time within which to prepare its views; and
- an opportunity to present the view to the party having the duty to consult.

The consulting party must also give full and fair consideration to the views so presented.

Clause 4: Primacy

In the event of an inconsistency or conflict between the bill and a final agreement, clause 4 provides that the agreement is to prevail to the extent of the inconsistency or conflict.

Clause 5: Purposes of the Legislation

Clause 5(1) affirms that the proposed new Act is to give effect to the *Umbrella Final Agreement* respecting assessment of environmental and socio-economic effects. Clause 5(2), in turn, sets out ten specific purposes for the legislation which closely parallel, but are not identical to, the eight purposes set out in section 12.1.1 of the *Umbrella Final Agreement*. The purposes enunciated in clause 5(2) of the bill are as follows:

- to provide a comprehensive, neutrally conducted assessment process applicable in Yukon;
- to require consideration of the environmental and socio-economic effects of projects before they are undertaken;
- to protect and maintain environmental quality and heritage resources;
- to protect and promote the well-being of Yukon Indians, their societies and Yukon residents generally, as well as the interests of other Canadians;

- to ensure that projects are undertaken in accordance with principles that foster beneficial socio-economic change without undermining the ecological and social systems on which communities and their residents, and societies in general, depend;

- to recognize and, to the extent practicable, enhance the traditional economy of Yukon Indian persons and their special relationship with the wilderness environment;

- to guarantee opportunities for the participation of Yukon Indians, and make use of their knowledge and experience, in the assessment process;

- to provide opportunities for public participation in the assessment process;

- to ensure that the assessment process is conducted in a timely, efficient and effective manner that avoids duplication; and

- to the extent practicable, to provide certainty to assessment procedures, including information requirements, time limits and costs to participants.

Clause 6: Application of the *Canadian Environmental Assessment Act*

Clause 6 generally provides that the environmental assessment provisions of the *Canadian Environmental Assessment Act* (CEAA) will *not* apply in Yukon. This exclusionary rule is not absolute. Under clause 6, a project in Yukon will be subject to an environmental assessment under the CEAA if the project is not a project or existing project within the meaning of the Act (Bill C-2), but it is a project subject to review under the CEAA; *and*

- if, in relation to a project, the Minister of the Environment has, as provided under clause 63, agreed or decided to establish a review panel under the CEAA or to enter into an agreement for the joint establishment of a review panel with another jurisdiction under the CEAA; or

- if, in relation to a project, authorization from the National Energy Board is required for the project to be undertaken. However, if such a project is referred to a panel review under the CEAA, notice of the referral must be given to the executive committee and the provisions of clause 63 of the bill apply as if the Minister of the Environment had agreed to a request under clause 61(1)(b) to establish a review panel under the CEAA or enter into an agreement for the joint establishment of a review panel with another jurisdiction.

It should be noted that the wording of clause 6 is extremely unclear and is therefore open to interpretation. There would also seem to be some variation between the French and English texts.

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PART 1: THE YUKON ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT BOARD AND DESIGNATED OFFICES

Clauses 8 to 19: The Yukon Environmental and Socio-economic Assessment Board

Clause 8 creates the Yukon Environmental and Socio-economic Assessment Board (hereinafter the Board). It consists of seven members: a three-person executive committee, including the Chair, and four other members. Provision is made for additional members to be appointed in even numbers.

The DIAND Minister is responsible for appointing members to the Board. However, some members must be appointed on the nomination of the Council of Yukon First Nations (the Council) or the territorial minister, in accordance with the formula set out in clause 8. In most cases, specified parties must first be consulted before the appointments or nominations are made. For example, the Council must consult Yukon First Nations before nominating a member to the Board (clause 8(6)). Regardless of the number of members appointed to the Board, half of its members, excluding the Chair, must be nominated by the Council, and the other half by the federal/territorial governments, as provided by section 12.7.5 of the *Umbrella Final Agreement*.

In addition, the Board's Chair, as well as a majority of the other Board members, must be Yukon residents (clause 9). Board members are appointed for a three-year term, except for the initial members who may be appointed for such shorter term as is specified under their appointment or nomination (clause 10). Members may be reappointed in the same or different capacity (clause 12). There is no limit on the number of times members may be reappointed.

Members serve during good behaviour, but they may be removed for cause or on any other ground set out in the by-laws of the Board. Removal of a member is mandatory if he or she becomes a non-resident and thereby places the Board in non-compliance with the prescribed residency requirements (clause 11).

Board members may not participate in any of the Board's business (or business of the executive committee or of a panel) if doing so would place the member in a material conflict of interest (clause 13(1)). Although the term "material conflict of interest" is not defined in the bill, clause 13(2) stipulates that a member is not in a material conflict of interest solely by virtue of being a Yukon Indian person.

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A quorum of the Board consists of a majority of the members holding office or three members, whichever is the greater. Provision is made for members to participate by telephone or other means of communication and, subject to the Board's rules and by-laws, those who participate by such means are deemed to be present at the meeting (clause 15).

Other attributes of the Board include the power to acquire or dispose of property, as well as sign contracts, in its own name (clause 16(1). In accordance with its approved budget, the Board may also employ such staff, agents, advisers and consultants as are necessary for the conduct of its business (clause 17).

The Board's main office is to be situated in Whitehorse unless another place in Yukon is designated by the Governor in Council (clause 19).

Clauses 20 to 22: Assessment Districts

Clause 20 calls for the creation of six contiguous assessment districts in Yukon for the purposes of conducting environmental and socio-economic assessments. The DIAND Minister establishes such districts in consultation with the territorial minister and First Nations and in accordance with any agreements concluded by them. The number of assessment districts could be changed if recommended by the Board on the basis of operational requirements and following consultation with the territorial minister and First Nations. Should the DIAND Minister decide against making the recommended change, he or she must provide the Board with written reasons.

Under clause 21, the Board *may* adjust the boundary between adjacent assessment districts, but it *must* do so where the DIAND Minister has changed the number of districts. Specified parties must be consulted before a boundary alteration is ordered. Notice of the order must also be given in specified publications.

Clause 22 to 25: Designated Offices

Each assessment district is to have an office, known as the "designated office," to be located in a community named by the DIAND Minister. Provision is also made for the relocation of a designated office, subject to specified consultation and publication requirements (clause 22).

Each designated office is to be staffed by employees of the Board who are assigned to that office by the Board. The Board must authorize one or more staff members to

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exercise the powers of the designated office in relation to evaluations. Any such powers may be delegated to another staff member (clause 23). At the request of a designated office, but subject to its approved budget, the Board must also procure services required by that office, as well as make property and facilities available to it (clause 25).

Staff members of a designated office are precluded from participating in any of the office's business that would place them in a material conflict of interest. A member would not be in a material conflict of interest solely by virtue of being a Yukon Indian person (clause 24).

Clauses 26 to 29: Annual Budgets, Audits and Reporting Requirements

All designated offices must prepare a budget for the ensuing fiscal year and submit it to the Board, after consulting any First Nations having territory situated in whole or in part within the assessment district (clause 26).

The Board must, in turn, prepare its own annual budget, which must incorporate the budgets of the designated offices, as originally submitted or as modified by the Board. The Board's budget may also include funding in order to enable its members and staff to carry out their functions in their traditional languages and to provide them with training, including cross-cultural orientation and education, for the purpose of improving their ability to carry out their duties (clause 27).

The Board must submit its budget to the DIAND Minister, who may either approve it as submitted or with such variations that the DIAND Minister may make after seeking the views of the Board, the territorial minister and the Council (clause 27(2)).

Clause 28 requires the Board to maintain books of account and related records in accordance with applicable accounting principles. The Board must also prepare consolidated financial statements for each fiscal year in the specified manner.

All of the Board's accounts, financial statements and financial transactions must be audited annually by its own auditor or by the Auditor General of Canada where requested by the DIAND Minister. The auditor or Auditor General of Canada, where applicable, must make a report of the audit to the Board, as well as to the DIAND Minister (clause 28(3)).

Finally, within three months following the end of each fiscal year, the executive committee must prepare and submit an annual report of its activities to the Board. It must also

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submit the approved report to the DIAND Minister and make it available to the public (clause 29).

Clauses 30 to 36 and 38: Rules and By-laws

Clauses 30 to 34 set forth the rules that the Board *may* or *must* make in relation to the assessment or review of projects. These rules cover such things as the form and content of project proposals; a determination of the project's scope; the parties and persons who may participate in the assessment process; and timelines for various action to be taken. The rules may vary according to the type of assessment to be conducted (i.e., evaluations by designated offices, screenings by the executive committee or reviews by panels of the Board). They may also vary according to the category of project being proposed.

Clause 33 requires the Board to make rules regarding the integration of scientific information, traditional knowledge and other information in the assessment process. It must also make rules to determine whether traditional knowledge and information protected under the *Access to Information Act* is to be dealt with on a confidential basis in the assessment process.

Although the Board is responsible for making most of the rules, designated offices are also empowered to make rules regarding the conduct of their own evaluations. In the case of an inconsistency, the rules of the Board are to prevail (clause 31(5)).

Notice of all proposed rules, whether developed by the Board or a designated office, must be provided in selected publications at least 60 days before they are made. A 60-day period within which to make written representations on the proposed rules must also be afforded. No further notice need be given if the proposed rules are amended solely in response to the representations that were made. All rules must be published in the *Canada Gazette* immediately after they are made (clause 34).

Clause 35 authorizes the Board to make by-laws to regulate its internal administrative affairs, including specifying grounds for removing its members from office other than for cause. Clauses 36 and 37, in turn, authorize both the Board and designated offices to make by-laws to regulate the internal administrative affairs of designated offices, but the Board's by-laws are to prevail in the case of an inconsistency.

Rules and by-laws made under the foregoing clauses are exempted from the registration and publication requirements of the *Statutory Instruments Act* (clause 38).

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Clause 37: The Development of Standard Mitigation Measures

Under clause 37, designated offices and the executive committee of the Board may develop standard mitigation measures that can be applied to classes of projects or to projects located within a given geographic area. The executive committee (but not designated offices) may also develop such measures in relation to classes of existing projects, or to existing projects within a given geographic area. Note that a "project" is not the same as an "existing project." Clause 2 defines "existing project" as an activity that has been undertaken or completed and that, if proposed to be undertaken, would be subject to assessment under clause 47 (clause 47 authorizes the making of regulations to identify which activities are to be assessed and it sets out the "triggers" for assessment under the Act).

Clause 37 further provides that the public must be provided with opportunities to participate in the development of the standard mitigation measures. It also stipulates that, unless otherwise provided by the rules, the standard mitigation measures developed by the executive committee are to prevail over those developed by the designated offices in the case of an inconsistency.

Clause 39: Consideration of Scientific Information and Traditional Knowledge

Under clause 39, designated offices, the executive committee and Board panels are required to give full and fair consideration to scientific information, traditional knowledge and other information provided to or obtained by them under the Act.

PART 2: ASSESSMENT PROCESS AND DECISION DOCUMENTS

Clauses 40 and 41: Assessments – General Provisions

Clause 40 requires the Board, the designated offices, the executive committee and panels of the Board to avoid duplication in the assessment process and, to the extent possible, to provide certainty to those participating in the assessment process with respect to the applicable procedures, including information requirements, time limits and costs.

The designated offices, the executive committee and the panels of the Board are, in turn, required by clause 41 to conduct assessments of projects, existing projects and plans in a timely and expeditious manner.

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Clause 42: Matters to be Considered in Conducting the Assessment

Under clause 42(1), designated offices, the executive committee and panels of the Board must, in conducting an assessment of a project or existing project (but not a plan), take the following matters into consideration:

- the purpose of the project or existing project;
- all of the stages of the project or existing project;
- the significance of any environmental or socio-economic effects of the project or existing project that have occurred or might occur in or outside of Yukon, including the effects of malfunctions or accidents;
- the significance of any adverse cumulative environmental and socio-economic effects that have occurred or might occur in connection with the project or existing project in combination with the effects of:
  - other proposed projects for which a submission for assessment has been made under clause 50(1); or
  - other existing or proposed activities known to the relevant entity (i.e., designated office, executive committee or panel of the Board) from information provided to or obtained by it under the Act.
- alternatives to the project or existing project, or alternative ways of undertaking or operating it, that would avoid or minimize any significant adverse environmental and socio-economic effects;
- mitigative measures and measures to compensate for any significant adverse environmental and socio-economic effects;
- the need to protect the rights of Yukon Indian persons under final agreements, their special relationship with the wilderness environment, and the cultures, traditions, health and lifestyles of Yukon Indian persons and other Yukon residents;
- the interests of Yukon residents and Canadian residents outside Yukon;
- any matter that a decision body has asked be taken into consideration; and
- any matter specified in the regulations.

In addition to the foregoing, clause 42(2) requires the executive committee or a panel of the Board (but not the designated offices) to take into consideration:

- the need for effects monitoring; and

- the capacity of any renewable resources that are likely to be significantly affected by the project or existing project to meet present and future needs.

Consideration must also be given to any standard mitigative measures developed in relation to projects or existing projects belonging to a class or located in a geographic area. Any matter considered relevant to the assessment may also be considered (clause 42(3) and (4)).

Clauses 44 and 45: Regional Land Use Plans

Where a project is proposed in a planning region established under a final agreement for which a regional land use plan is in effect, the entity carrying out the assessment must request the advice of the relevant planning commission on whether the project complies with the regional land use plan. Where there is non-conformity, the regional land use plan must be considered, and the planning commission must be invited to make representations. Should the entity carrying out the assessment decide to proceed with the non-conforming project, it must, to the extent possible, recommend terms and conditions that will bring the project into conformity (clause 44).

Conversely, where a regional land use plan is being prepared (as opposed to being in effect), the executive committee and the relevant designated offices, if notified of the forthcoming plan, must provide the planning commission with the information they have in hand about every project in the planning region for which an assessment is pending. The planning commission must be invited to make representations to the relevant entity when the assessment is being conducted (clause 45).

Clause 46: Public Participation

Unless otherwise specified in selected provisions of the Act, designated offices, the executive committee and panels of the Board are required by clause 46 to provide and publicize opportunities for interested persons and the public to participate in the assessments conducted by them.

Clause 47: Projects Subject to Assessment and Assessment Triggers: The General Rule

The activities that may be made subject to assessment under the Act are those that are listed in regulations made by the Governor in Council. Regulations may also be made setting out exceptions to the listed activities (clause 47(1)). In addition to being a listed activity that has

not been exempted under the regulations, a project that is proposed to be undertaken in Yukon must, in order to be subject to an assessment, involve one of the triggers set out in clause 47(2), namely:

- a federal agency or a federal independent regulatory agency is either the proponent of the project or has received an application to fund the project;
- a territorial agency, municipal government, territorial independent regulatory agency or a First Nation is the proponent of the project and an authorization or the grant of an interest in land would be required if a private individual were to undertake the project;
- an authorization or grant of an interest in land by a territorial agency, municipal government, territorial independent regulatory agency or a First Nation is required for the project; or
- the project requires an authorization by the Governor in Council.

Clause 2 provides definitions for the following entities mentioned above: federal agency, federal independent regulatory agency, First Nation, territorial agency and territorial independent regulatory agency.

Clause 48: Exceptional Assessments of Excluded Activities

Even though a project is exempted from the activities list under the regulations, it may nonetheless have to undergo an assessment. In specified circumstances, clause 48(1) authorizes a federal agency, the DIAND Minister, the territorial minister or a First Nation to issue a declaration requiring that an exempted activity be assessed. All of the entities mentioned in clause 48(1) that have the power to make such a declaration must consent to the declaration before it can be made (clause 48(2)). Moreover, a declaration may be made only if the proposed activity might, in the opinion of the relevant entities:

- have significant adverse environmental and socio-economic effects in or outside of Yukon (clause 48(3)(a));
- contribute significantly to cumulative adverse environmental and socio-economic effects in combination with other proposed projects that must be assessed under the Act or with other activities known to them that are proposed, undertaken or completed in or outside of Yukon (clause 48(3)(b));

A declaration may also be made under clause 48(4) where the proposed activity:

- is to be undertaken in an area that is or that contains a heritage resource and is protected by law as such or is identified as an area that should be protected as such in a land use plan under a final agreement;

- is to be undertaken in a special management area that is identified as such in a final agreement or that is established in accordance with a final agreement; or

- is to be undertaken in an area that forms the habitat for any plant or wildlife species that has been determined to be rare, threatened, endangered or at risk under a federal, territorial or First Nation law.

Clause 49: No Assessments in Cases of Emergency

Clause 49(1) exempts from assessment any activity otherwise subject to an assessment if the activity is undertaken:

- in response to a national emergency for which special temporary measures are being taken under the *Emergencies Act*; or

- in response to an emergency, when it is in the interest of public welfare, health or safety or of protecting property or the environment that the activity be undertaken immediately.

As soon as practicable after the emergency activity is completed, the designated office of each assessment district in which the activity was undertaken must be provided with a written report describing the nature, extent and duration of the activity, as well as any work required to restore or rehabilitate the area affected by it (clause 49(2)).

Clause 50: Submission of a Project Proposal

The proponent of a project must submit a proposal to the designated office(s) for the assessment district(s) where the project is to be undertaken, unless it is a project that the regulations require be submitted to the executive committee (clause 50(1)). In the latter case, clause 50(4) requires the executive committee to notify the Minister of the Environment of any project proposal it receives that involves a federal decision body (as defined in clause 2)).

In preparing the proposal, the proponent must take into consideration selected matters that clause 42 requires be considered in the assessment (the matters to be considered are different depending on whether the proposal must be submitted to the executive committee or designated office(s)). The proponent must also incorporate any mitigative measures that may be appropriate (clause 50(2)).

Before submitting a proposal to the executive committee, the proponent must consult any First Nation or community in which the project is to be located or might have significant environmental or socio-economic effects (clause 50(3)). This requirement does not apply to proposals submitted to a designated office.

Clauses 51 to 53: Scoping and Grouping of Projects

Following receipt of a proposal, the executive committee or designated office must determine the project's scope, which encompasses any activity identified in the proposal, as well as **any other** activity likely to be undertaken in relation to **an activity so identified** and sufficiently related to it to be included in **the project** (clause 51). The executive committee or designated office is also required to assess, as a single project, two or more projects for which it has received a proposal, where it considers that the projects are so closely related as to be part of the same activity or where all the decision bodies (defined in clause 2) for each of the projects have advised that they consider the projects to be so related (clause 52).

Where two or more designated offices are involved, either because a single project is located in two or more assessment districts or a designated office considers that projects located in two or more assessment districts are closely related, clause 53 authorizes an evaluation to be carried out in accordance with the Board's rules either by them jointly or by one of them on behalf of the other(s).

Clause 54: Withdrawal of Projects

Proponents who decide not to proceed with their project must give notice to any body that has conducted or is conducting an assessment, as well as to any decision body considering recommendations in relation to the project. Upon notification, the activity in question (assessment or recommendations) must be discontinued.

Clauses 55 and 56: Evaluations by Designated Offices

A designated office to which a proposal for a project is submitted must consider whether the applicable rules have been complied with and notify the proponent accordingly. It must also determine whether the project will be located or might have significant environmental or socio-economic effects in the territory of a First Nation (clause 55(1)).

As soon as possible after notifying the proponent that the rules have been complied with, the designated office must commence the evaluation. In doing so, it *may* seek any information or views believed to be relevant to the evaluation. Before making a recommendation regarding the project, other than a recommendation that the project be referred to the executive committee for a screening, the designated office *must* seek the views of affected First Nations, as well as the views of any government agency, independent regulatory agency or First Nation that notified it of their interest in the project or in projects of that kind (clause 55(2) to (4)).

At the conclusion of the evaluation, clause 56(1) requires the designated office to make one of the following four recommendations:

- recommend to the relevant decision bodies that the project be allowed to proceed, where it has been determined that the project will not have significant adverse environmental or socio-economic effects in or outside of Yukon;

- recommend to the relevant decision bodies that the project be allowed to proceed with terms and conditions, where it has been determined that the project will have significant adverse environmental or socio-economic effects in or outside of Yukon, which can be mitigated by those terms and conditions;

- recommend to the relevant decision bodies that the project not be allowed to proceed, where it has been determined that the project will have significant adverse environmental or socio-economic effects in or outside of Yukon, which cannot be mitigated; or

- refer the project to the executive committee for a screening if it cannot determine whether the project, even with mitigation, will have significant adverse environmental or socio-economic effects.

Clause 56(2) and (3) sets out the notice requirements following a recommendation by the designated office. Where in turn the project is referred for a screening, clause 56(4) requires the proponent to submit a revised proposal to the executive committee that takes into account the broader range of matters that must be considered in a screening.

Clauses 57 to 59: Screenings by the Executive Committee

The steps for a screening by the executive committee under clause 57 are similar to those prescribed under clause 55 for an evaluation by a designated office (e.g., determination of proponent's compliance with the rules, views obtained from affected First Nations, etc.). The recommendations that the executive committee must make at the conclusion of a screening are also similar to the ones prescribed for evaluations, except that, where a determination cannot be

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made regarding the project's harmful effects, the project must be referred for review by a panel of the Board (clause 58(1)). Irrespective of the determination made at the screening, a panel review is also *mandatory* in the circumstances specified under clause 58(2). Thus, the action that the executive committee must take following a screening under clause 58(1) and (2) is as follows:

- recommend to the relevant decision bodies that the project be allowed to proceed without a review, where it has determined that the project will not have significant adverse environmental or socio-economic effects in or outside of Yukon;
- recommend to the relevant decision bodies that the project be allowed to proceed with terms and conditions, but without a review, where it has determined that the project will have significant adverse environmental or socio-economic effects in or outside of Yukon that can be mitigated by those terms and conditions;
- recommend to the relevant decision bodies that the project not be allowed to proceed and that it not be subject to a review, where it has determined that the project will have significant adverse environmental or socio-economic effects in or outside of Yukon that cannot be mitigated;
- require a review of the project where it cannot determine whether the project, even with mitigation, will have significant adverse environmental or socio-economic effects;
- require a review of the project where it has determined that the project, even with mitigation, might contribute significantly to cumulative adverse environmental or socio-economic in Yukon or is likely to cause significant public concern; or
- require a review of the project where it has determined that the project, even with mitigation, involves technology that is controversial in Yukon or the effects of which are unknown.

Where the executive committee recommends against a panel review, a decision body for the project can compel such a review by notifying the executive committee that it rejects the recommendation within 15 days of receipt. Where notification has not been given within the 15-day period and there is no federal decision body for the project, the Minister of the Environment must be so advised (clause 59).

Clause 60: Requests for a Panel Review

In addition to the instances outlined above under clause 58 mandating a panel review, clause 60(1) allows such reviews to be requested by the following parties:

- either the DIAND Minister or the Minister of the Environment, if there is a federal decision body for the project;
- the territorial minister, if he or she is a decision body for the project; or
- a First Nation, but only with the consent of the DIAND Minister, or with the consent of the DIAND Minister and of the territorial minister in cases where the latter is a decision body for the project.

Where the decision bodies for the project include both the territorial minister and a federal decision body, clause 60(2) specifies that a joint request for a panel review must be made. Clause 60(3), in turn, precludes a request for a panel review from being made where such a review is otherwise mandated by the executive committee under clause 58 or where a recommendation has already been made in relation to a project and all relevant decision bodies have issued decision documents.

A request for a panel review must specify whether the review is to be a public review or some other form of review (clause 60(4)).

Where a request for a panel review is made, any action on the project, be it at the assessment or decision-making stage, must be discontinued (clause 60(5)).

Clauses 61 to 64: Panel Reviews and the Role of the Minister of the Environment

Where a panel review is required under the Act *and* involves a federal decision body, or where a panel review is requested by one of the entities specified in clause 60, the executive committee must under clause 61(1):

- *OPTION 1*: notify the Minister of the Environment of its intention to establish such a panel;
- *OPTION 2*: request the Minister of the Environment to establish a review panel under the *Canadian Environmental Assessment Act* (CEAA) or enter into an agreement with another jurisdiction for the joint establishment of a review panel under the CEAA; or
- *OPTION 3*: request the Minister of the Environment to enter into negotiations for the establishment of a joint panel under clause 67 of the Act (Bill C-2).

Conversely, where a panel review is mandated under the Act, but there is *no* federal decision body, or where a panel review is requested by an entity specified in clause 60, the executive committee must under clause 61(2):

- request the Minister of the Environment to take action under either Option 2 or 3, above-noted, where it has been determined that the project might have significant environmental or socio-economic effects outside Yukon; or
- notify the DIAND Minister that the project will not have such effects.

Clauses 61(3) and (4) specify the action that the Minister of the Environment may or must take in response to a notification from the executive committee. If the Minister of the Environment disagrees with the executive committee's decision, the latter must make a request under Option 2 or 3, above-noted. Where, in turn, the executive committee requested action under Option 2 or 3, clause 62(1) requires the Minister of the Environment to notify the executive committee as to whether he or she agrees with the request and, in the case of a request under Option 2, specify which course of action he or she intends to pursue.

Under clause 62(2), the Minister of the Environment can overrule a decision of the executive committee under clause 59(2) not to refer a project for a panel review. In such a case, the Minister must provide notification to the appropriate decision bodies of his or her intention to take action under Option 2 (i.e., establishment of a review panel under the CEAA or joint establishment of a review panel with another jurisdiction under the CEAA).

Clause 63 sets out the provisions that will apply when action is taken under Option 2 (i.e., establishment of a review panel under the CEAA or joint establishment of a review panel with another jurisdiction under the CEAA). Notably, before setting up the review panel in question, the Minister of the Environment must determine whether the project will be located, or might have significant environmental or socio-economic effects, in a First Nation territory. If so, a request must be made to affected First Nations, asking them to indicate, within the next 30 days, whether they consent to the appointment of the relevant review panel (clause 63(3)). Should any First Nation not indicate its consent within the 30-day period, a request must be made to the Council and the territorial minister, asking each of them to provide a list of nominees for the review panel (clause 63(4))

Under clause 63(5), the applicable review panel may be appointed and its terms of reference may be fixed only if all affected First Nations have given their consent within the

requisite 30 days. If they have not, the 60-day period within which the Council and the territorial minister must each submit a list of nominees must elapse. After the expiry of this period, the members of the review panel must be chosen, at least one-quarter of whom must be selected from each list, if any, that was submitted.

Clause 64 authorizes the Minister of the Environment to refer a project back to the executive committee for review within 45 days after specified action is taken.

Clauses 65 and 66: Establishment of Panels by the Executive Committee

Clause 65(1) and (2) sets out the circumstances under which the executive committee must establish a panel of the Board. Before doing so, it must determine whether the project is likely to have significant adverse environmental or socio-economic effects primarily on settlement land or on non-settlement land (clause 65(3)).

Under clause 65(4), the executive committee must select the panel, including its Chair, from among the Board members. The panel members are selected in accordance with the formula set out in clause 65(5), which specifies different scenarios depending on whether the project's effects are likely to occur primarily on settlement lands or non-settlement lands.

Clause 65(6) provides that panel members must be present at each meeting or hearing of the panel. Note that members who participate by telephone or by other means of communication may be "deemed present" at the meeting by virtue of clause 15(2).

Clause 65(7) sets out the options that are available to the executive committee where there is a change in the panel due to a member's absence, incapacity or vacancy of office.

Clause 66 sets out further procedural requirements that the executive committee must comply with in setting up a panel of the Board. These include fixing the panel's terms of reference (clause 66(1)) and giving notice to the public of the panel review in a periodical with a large circulation in Yukon (clause 66(2)). In addition, the executive committee must provide copies of the terms of reference to selected parties, notably any First Nation that might be affected by the proposed project, or any government agency, independent regulatory agency or First Nation that notified the executive committee of its interest in the project or in projects of that kind (clause 66(4)).

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Clause 67: Agreements for the Establishment of Joint Panels

Where the executive committee has requested the establishment of a joint panel under clause 61(1)(c), and the Minister of the Environment has agreed to the request, clause 67(1) empowers the executive committee, with the approval of the DIAND Minister, to enter into an agreement with the Minister of the Environment for the establishment of such a panel. In the circumstances specified in clause 67(2), the executive committee may also, with the approval of the DIAND Minister, enter into an agreement to establish a joint panel with either the Minister of the Environment *or* any authority having the power to examine the environmental or socio-economic effects of the project or of an activity that is to be undertaken partly outside Yukon and of which the project forms part.

Clause 67(3) sets out the matters that must be covered under an agreement to establish a joint panel, including: the composition of the joint panel and the manner of appointment of its members and selection of its Chair; the joint panel's terms of reference; specified factors that the joint panel must consider in carrying out the review; and the rules to be followed in the conduct of the review.

Clause 67(4) requires publication of the agreement in the prescribed manner, whereas clause 67(5) deals with the indemnification of the members of the joint panel in relation to any claims arising out of their functions as members.

Once an agreement to establish a joint panel has been concluded, the executive committee must determine whether the project will be located, or might have significant environmental or socio-economic effects, in the territory of a First Nation (clause 68(1)). It must also provide copies of the joint panel's terms of reference to specified parties, notably any First Nation that might be affected by the proposed project, or any government agency, independent regulatory agency or First Nation that notified the executive committee of its interest in the project or in projects of that kind (clause 68(2)).

Clause 69 stipulates that a review by a joint panel fulfils the requirements of any provision of the Act for a review by a panel of the Board.

Clauses 70 to 73: Reviews by Joint Panels and Panels of the Board

Subject to the terms of reference under which they were established, as well as the particular form of review that was specified in the request for review made under clause 60,

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clause 70(1) provides that panels and joint panels may determine any matter considered appropriate for the conduct of the review, but they must determine:

- a schedule for the review;
- the information to be provided by the proponent; and
- the manner of participation by First Nations, residents of the community, the federal and territorial governments and interested persons.

Before commencing hearings, the panel or joint panel must also determine whether the project will be located or might have significant adverse environmental or socio-economic effects on First Nations' settlement lands or non-settlement lands (clause 70(2)).

Under clause 70(3), public hearings may be held in any location chosen by the panel. Where, however, a request was made under clause 60(4) for a form of review other than a public review, the panel or joint panel must hold hearings in the locations specified in clause 70(3), unless the relevant parties agree otherwise.

The public hearings held by a panel or a joint panel may be combined with the public hearings held by any other entity in relation to the project if, in the case of a panel of the Board, the executive committee gives its approval, or, in the case of a joint panel, it is in accordance with the agreement under which the joint panel was established (clause 70(4)).

Panels and joint panels have, for the purposes of reviewing a project, the powers, rights and privileges of a superior court regarding the attendance and examination of witnesses and the production and inspection of documents (clause 71).

As with screenings under clause 57, a panel or joint panel must, before commencing its review, ensure that the proponent has complied with the applicable rules (clause 72(1)). It must also, before making a recommendation, seek the views of all relevant parties, including affected First Nations (clause 72(3)).

At the conclusion of the review, clause 72(4)) requires the panel or joint panel to make one of the following recommendations:

- recommend to the relevant decision bodies that the project be allowed to proceed, where it has determined that the project will have no significant adverse environmental or socio-economic effects in or outside of Yukon;

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- recommend to the relevant decision bodies that the project be allowed to proceed, with terms and conditions, where it has determined that the project will have significant adverse environmental or socio-economic effects in or outside of Yukon that can be mitigated by those terms and conditions.

- recommend to the relevant decision bodies that the project not be allowed to proceed, where it has determined that the project will have significant adverse environmental or socio-economic effects in or outside of Yukon that cannot be mitigated.

Where a review panel was established under the CEAA, clause 73 requires that the report that must be submitted to the Minister of the Environment include one of the foregoing recommendations. A copy of the report must also be provided to the relevant decision bodies, as well as to the project's proponent.

Clauses 74 to 81: The Responsibilities of the Decision Bodies

In considering the recommendation made in relation to a project, a decision body (defined in clause 2) must give full and fair consideration to scientific information, traditional knowledge and other information provided with the recommendation. It must also consult First Nations for which no final agreement is in effect if the project is to be located in whole or in part in their territory or might have significant adverse environmental and socio-economic effects in that territory (clause 74).

Subject to the special measures in clause 79 for projects involving the right to work mines and minerals in selected areas, clause 75 provides that where a recommendation is made by a designated office or by a panel or joint panel established under the CEAA, the decision body must issue a decision document within the prescribed time, either accepting, rejecting or varying the recommendation. However, where a review panel under the CEAA makes a recommendation to a *federal* decision body (defined in clause 2), that body need not issue a decision document within the prescribed period and may not do so unless it obtained the approval of the Governor in Council.

Subject to the special measures in clause 79, above-noted, and except where, pursuant to clause 59(1), the recommendation of the executive committee not to refer a project for a review was rejected by the decision body, clause 76(1) requires a decision body that receives a recommendation from the executive committee or a panel of the Board to, within the prescribed time, either issue a decision document accepting the recommendation, or refer the

matter back to the executive committee or the panel of the Board for reconsideration, unless the recommendation in question was made in response to a previous referral under this clause.

Where the matter is referred back for reconsideration, notice must be given to specified parties, including the project's proponent, any other decision bodies and the designated office in whose assessment district the project is to be undertaken (clause 76(2)). Upon being notified, the other decision bodies for the project must discontinue considering the recommendation. The parties responsible for implementing a decision document already issued must also refrain from taking any action that would enable the project to be undertaken (clause 76(3)).

In terms of reconsidering the matter, the executive committee or panel of the Board has the same powers and duties that it had in relation to a screening or a review (clause 77(1)). Unless a new recommendation is made within the prescribed time, the executive committee or panel of the Board is deemed to have reaffirmed its initial recommendation (clause 77(2)).

When a new recommendation is made or deemed reaffirmed, the decision body must issue a new decision document accepting, rejecting or varying the latest recommendation, and such a decision document replaces any previous decision document issued in relation to the project (clause 77(3)).

Where two or more decision bodies are required to issue a decision document, they are obliged under clause 78 to consult each other, in accordance with the regulations, with a view to harmonizing their decision documents. They may also agree to consolidate their decision documents.

Clause 79 enacts special measures regarding projects involving the right to work mines or minerals situated in category B or fee simple settlement land or Tetlit Gwich'in Yukon land (these terms are defined in clause 2). Where such projects involve the issuance of a decision document by a First Nation, as well as by a federal decision body or the territorial minister, this clause provides that any recommendation made in relation to them cannot be varied or rejected except where a recommended term or condition is:

- insufficient to prevent unacceptable environmental or socio-economic effects in Yukon;
- more onerous than necessary to prevent such effects; or
- so onerous as to undermine the economic viability of the project.

Clause 80 requires decision documents to contain the reasons for which the decision body rejected or varied any recommendation. It also stipulates that a decision document is not a statutory instrument for the purposes of the *Statutory Instruments Act*.

Finally, clause 81(1) sets out a long list of parties entitled to receive a copy of a decision document in applicable circumstances. Where a decision document allows a project to go ahead that is not in conformity with a land use plan, clause 81(2) mandates that a copy also be provided to the planning commission that prepared the plan, and well as to any person or body that approved it.

Clauses 82 to 85: Implementation of the Decision Documents

Clauses 82 to 84 preclude the relevant decision bodies (federal agency, territorial minister or First Nation) from proceeding with the project (or requiring or allowing it to be proceeded with), until they have issued the requisite decision document allowing the project to go ahead. The specified parties (federal agency, territorial agency/municipal government or First Nation) must, in turn, implement the decision document (or require or allow it to be proceeded with), once the document has been issued. A federal agency must do so notwithstanding any limitations in any other federal law (clause 82). Conversely, a territorial agency or municipal government must do so to the extent of its authority under the *Yukon Act*, territorial laws or municipal by-laws (clause 83), as must a First Nation, to the extent of its authority under the *Yukon First Nations Self-Government Act*, First Nation laws or its final agreement (clause 84). Special provisions, however, apply in relation to the implementation by a First Nation of a project involving the right to work mines or minerals situated in category B or fee simple settlement land or Tetlit Gwich'in Yukon land. In taking action in relation to such a project, a First Nation must implement:

- the decision document issued by the territorial minister to the extent that it is inconsistent with the First Nation decision document, where the Commissioner of Yukon has the administration and control of those mines or minerals (clause 84(3)(a)); or

- the decision document issued by a federal agency to the extent that it is inconsistent with the First Nation decision document, where the federal agency has the administration (though not the control) of those mines or minerals (clause 84(3)(b)).

Clause 86: Issuance of Water Licences by the Yukon Territory Water Board

Clause 86 precludes the Yukon Territory Water Board from issuing a water licence, or from setting licence terms, that would be contrary to or conflict with a decision document issued by another federal agency or a decision that a territorial agency, municipal government or First Nation must implement under clauses 83 or 84.

Clauses 87 and 88: Action by Territorial and Federal Independent Regulatory Agencies, Including the National Energy Board

Under clause 87(1), federal independent regulatory agencies are precluded from taking action in relation to a project until every relevant federal decision body, as well as the territorial minister where the National Energy Board (NEB) is involved, has issued a decision document.

Except for the NEB, all such federal agencies, when requiring a project to be undertaken or when taking any action enabling it to go ahead, must endeavour to the extent practicable to implement any decision document issued by a federal decision body. Where, in turn, such agencies issue an authorization enabling the project to go ahead, they must endeavour to the extent practicable to make their authorization conform with any decision document issued federally. They must also provide written reasons for any want of conformity (clause 87(2)).

Different measures apply to the NEB. When the NEB requires a project to be undertaken or where it provides financial assistance for a project, it must "take into consideration" (as opposed to implement to the extent practicable) any decision document issued by a federal decision body or the territorial minister. When issuing an authorization enabling the project to go ahead, the NEB must also take such decision documents "into consideration," although, like other federal independent regulatory agencies, the NEB must provide the minister and decision bodies with written reasons for any want of conformity (clause 87(3)).

Under clause 88, territorial independent regulatory agencies are subject to similar measures to those that apply to their federal counterparts. That is, they must await the territorial minister's decision document before taking action; they must thereafter endeavour, to the extent practicable, to comply with any decision document issued by the territorial minister and, in the case of an authorization, they must provide written reasons to the territorial minister for any want of conformity.

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Clause 89: Notice to the Board

Following the issuance of a decision document allowing a project to go ahead, clause 89 requires all government agencies, independent regulatory agencies, municipal governments and First Nations to notify the Board when they take the following action:

- issue an authorization requiring the project to be undertaken, or amend or rescind that authorization;
- grant any interest in land required for the project, or modify or withdraw that interest;
- provide any funding enabling the project to go ahead, or alter or cancel such funding.

Clauses 90 to 91: Special Measures for Projects on the Yukon North Slope

In addition to the factors that must be considered in carrying out an assessment under the Act, where a project located on the Yukon North Slope is involved, the need to protect the rights of the Inuvialuit under the *Inuvialuit Final Agreement* must also be taken into consideration, as well as any other matter considered relevant (clause 90(2)).

Where, in relation to such projects, a recommendation is made by a designated office, the executive committee or a panel of the Board, a copy of the recommendation, including reasons, must be provided to the Environmental Impact Screening Committee (the Screening Committee) established under the Agreement (clause 90(3)). In cases where the executive committee requires that the project be reviewed by a panel of the Board, the Screening Committee must also be provided with the reasons for doing so (clause 90(4)).

Should the Screening Committee or the Environmental Impact Review Board (also established under the Agreement) examine a project located on the Yukon North Slope, the competent authority that receives the related report or recommendation pursuant to the Agreement must provide a copy of its response to such a report or recommendation to the Board (under Bill C-2), as well as to the designated office in whose assessment district the project is located (clause 91(1)).

Should the Screening Committee refer the project to the Environmental Impact Review Board, the relevant provisions of the Act (Bill C-2) dealing with assessments and decision documents cease to apply. In cases where a panel of the Board was already established

to review the project, the panel must provide copies of all relevant documents to the Environmental Impact Review Board (clause 91(2)).

Clauses 92 and 93: Collaboration and External Activities

Clause 92 requires a designated office or the executive committee, when assessing a project forming part of an activity to be located wholly or partly in Yukon, to collaborate to the extent practicable with any other body proposing to examine the environmental or socio-economic effects of the activity. Should such a body issue a report, the designated office or executive committee may, instead of carrying out all or part of its assessment, adopt any portion of the report that it believes fulfils any of the requirements under the Act.

As regards an activity outside Yukon, clause 93(1) empowers the executive committee to act on the request of a specified authority and establish a panel of the Board or participate in an assessment carried out by a public body outside Yukon, where it is of the opinion that the activity has or will have significant adverse environmental or socio-economic effects in Yukon. Such a request may be made by the DIAND Minister or the Minister of the Environment. It may also be made by the territorial minister or a First Nation, but they would have to bear the related expenses unless the DIAND Minister agreed to the request. Where the executive committee agrees to set up a panel of the Board to carry out the review, it must do so in accordance with the agreement that it concluded with the applicable minister or First Nation. Where it opts to participate in the assessment carried out by the outside public body, it must do so in the manner specified in the request and accepted by that body.

Where a panel of the Board was set up to carry out the review, it must submit a report on any significant adverse environmental or socio-economic effects of the activity to its proponent, as well as to the applicable minister or First Nation that requested the review and to the DIAND Minister in cases where he or she consented to the review (clause 93(2)). The requesting authority must provide the Board with a written response to the panel's report (clause 93(3)).

Clauses 94 to 101: The Review of Existing Projects

At the request of a specified authority, clause 95(1) requires the executive committee to establish a panel of the Board to conduct a review of an "existing project" for which there is, in most cases, an "administrative authority."

Clause 2 defines an "existing project" as an activity that has been undertaken or completed and that, if proposed to be undertaken, would be subject to assessment under clause 47. The term "administrative authority" is defined in clause 94 to mean, in relation to the review of an existing project, a government agency, an independent regulatory agency, a municipal government or a First Nation that:

- is the operator of the existing project (operator is defined in clause 94 as the person or body responsible for the project's operation);
- has the power to assume the operation or to shut down the existing project, and includes the Governor in Council, if it has such a power; and
- has the power to amend, suspend or revoke an authorization that was issued, or to modify, suspend or withdraw an interest in land that was granted, to enable the project to be undertaken or completed, and includes the Governor in Council, if it has such a power.

Under clause 95(1), a review may be requested by the appropriate authority in relation to:

- an existing project;
- a proposed abandonment, decommissioning or temporary shutdown of an existing project; or
- a proposed significant change to an existing project other than a change that is subject to assessment under any other provision of the Act.

The authorities that may request the review under clause 95(1) are as follows:

- the DIAND Minister, if there is an administrative authority for the existing project that is a federal agency or federal independent regulatory authority;
- the territorial minister, if there is an administrative authority for the existing project that is established by or under the *Yukon Act*; or
- a First Nation, with the consent of the DIAND Minister, as well as the consent of the territorial minister if a territorial agency, a municipal government or a territorial independent regulatory agency is an administrative authority for the existing project.

Where the existing project involves both federal and territorial administrative authorities, a joint request must be submitted by the respective ministers (clause 95(2)). Where in turn the existing project involves a First Nation administrative authority, a request by the

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federal or territorial minister may only be made with the consent of the First Nation (clause 95(3)).

A request for review must specify whether the review is to be a public review or some other form of review (clause 95(4)). If the requesting authority withdraws its request, the panel must discontinue the review (clause 95(5)).

Clauses 96 to 100 deal with the establishment of the review panel, its composition, its powers and the steps that must or may be taken in carrying out the review. Since these provisions closely parallel those prescribed for reviews by joint panels and panels of the Board in clauses 65 to 72, they will not be repeated here.

Clause 101(1) requires the panel to submit a written report of its review to the minister(s) or the First Nation that requested the review. The panel may also make any recommendation based on the review that it considers appropriate.

Under clause 101(2), a copy of the report must also be provided to the operator of the existing project, every relevant administrative authority and, where applicable, any minister that consented to the review.

Clause 101(3) requires the minister or First Nation that requested the review to give full and fair consideration to any recommendations made by the panel. It also requires the minister or First Nation to provide the Board with a written response, describing any action planned in response to the report.

Clauses 102 to 109: The Review of Plans

Similarly to clause 95, which authorizes the review of existing projects involving an administrative authority, clause 103 authorizes the review of "plans" prepared by an "originator," if the review is requested by a specified authority. In contrast to the former, however, a review of a plan may also be triggered by the executive committee, on its own motion, in the circumstances specified in clause 105.

Clause 2 defines a "plan" as any plan, program, policy or proposal that is not a project or existing project. Clause 102 defines "originator" to mean a government agency, First Nation or other body by or for which a plan is prepared.

If requested by a specified authority, the executive committee may, under clause 103(1), establish a panel of the Board to review a plan where the executive committee considers that the implementation of such a plan might have significant adverse environmental or

socio-economic effects in Yukon. Before doing so, the executive committee must also take several matters into consideration, as provided in clause 104 (see below).

Under clause 103(1), the request to have a panel of the Board review a plan may be made by:

- the DIAND Minister, if a federal agency is the plan's originator;
- the territorial minister, if a territorial agency or municipal government is the plan's originator; or
- a First Nation, but at its own expense unless the DIAND Minister consents, and also with the consent of the territorial minister should the plan's originator be a territorial agency or municipal government.

As with the review of existing projects under clause 95, provision is made in clause 103 regarding:

- the submission of joint requests in specified circumstances (clause 103(2));
- the need to specify the form of review to be conducted (clause 103(4)); and
- the discontinuance of the review should the request be withdrawn (clause 103(5)).

Pursuant to clause 103(3), if a municipal government is the originator of the plan, the territorial minister is authorized to request, or consent to, the review only with the agreement of the municipal government.

In determining whether to establish a panel of the Board to review a plan, clause 104 requires the executive committee to consider:

- whether, during the plan's preparation, consideration was given to the matters listed in clause 108(3) that the panel, if established, would have to consider in the course of its review;
- whether there is a need for the plan to be reviewed by an independent body such as a panel of the Board and whether there is a more appropriate body or process for doing so; and
- whether the originator of the plan agrees to the review.

The executive committee must notify the originator of its determination. Where it has decided to establish a panel of the Board, it must also set the terms of reference and the schedule for the review, subject to the form of review specified by the requesting authority (clause 104(2) and (3)).

Under clause 105(1), the executive committee may also trigger a review of a plan on its own motion if:

- the plan is of a type specified in the regulations; and
- the executive committee considers that the plan's implementation might have significant adverse environmental or socio-economic effects in Yukon.

In such cases, the executive committee must notify the plan's originator of its decision to establish a panel of the Board. It must also specify the scope of the review, the panel's terms of reference and a schedule for the review (clause 105(2) and (3)).

Where the executive committee has decided to establish a panel of the Board to review a plan, whether pursuant to the request of a specified authority or on its own motion, it must comply with the publication requirements, as well as provide selected parties with copies of the panel's terms of reference, in the manner specified in clause 106.

Clause 107 deals with the selection of members of the panel, their attendance at meetings and the action that may be taken in the case of incapacity, absence or a vacancy on the panel. In contrast to clauses 65(5) and 96(3), which set forth the composition of panels established to review either projects or existing projects, there are no comparable provisions in the bill regarding the composition of panels established to review a plan.

Apart from authorizing the panel conducting the review of a plan to take into consideration any matter considered relevant, clause 108 requires the panel to consider specified matters. These matters, which are similar to the ones that must be considered in reviewing projects and existing projects under clause 42, are as follows:

- the significance of any environmental or socio-economic effects in or outside of Yukon that might occur from the implementation of the plan;
- the significance of any adverse cumulative environmental and socio-economic effects that might occur from the implementation of the plan in combination with:
  - proposed projects for which a submission for assessment has been made under clause 50(1); or

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- other existing or proposed activities, or the implementation of other plans, in or outside of Yukon, that are known to the panel from information provided to or obtained by it under the Act;

- alternatives to the plan that would avoid or minimize any significant adverse environmental and socio-economic effects;

- mitigative measures and measures to compensate for any significant adverse effects;

- the need to protect the rights of Yukon Indian persons under final agreements, their special relationship with the wilderness environment and the cultures, traditions, health and lifestyles of Yukon Indian persons and other Yukon residents;

- the interests of Yukon residents and of Canadian residents outside Yukon;

- the capacity of any renewable resources that are likely to be significantly affected by the implementation of the plan to meet present and future needs; and

- the need for effects monitoring.

Following completion of its review of the plan, the panel must provide the originator with written recommendations, which may include a recommendation that the plan be implemented, with or without alteration, or that it not be implemented. It must also provide copies of its recommendations to any minister, First Nation or municipal government that requested or consented to the review (clause 109(1) and (2)).

Clause 109(3) requires the originator to give the panel's recommendations full and fair consideration. Should any of the recommendations be rejected, the originator must provide the Board with written reasons for doing so.

Clauses 110 and 111: Audits and Effects Monitoring

Clauses 110 and 111 set out the circumstances under which project audits and effects monitoring may be carried out. The provisions in clause 110, which apply to "projects," are different from those in clause 111, which apply to "existing projects." No provision is made for conducting audits or effects monitoring in relation to "plans."

Clause 110(1) provides that, where the body (designated office, executive committee, panel of the Board or joint panel) that carried out a review in relation to a "project" recommends that the project be allowed to proceed, with or without terms and conditions, it may

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recommend that a project audit or effects monitoring be conducted in relation to the project. If the relevant decision body accepts to do so, it must provide the results of the action taken, either to the designated office, if that body made the recommendation, or to the executive committee, where the recommendation was made by any other body (clause 110(2)). After reviewing the results of the project audit or effects monitoring provided to it, the designated office or executive committee may provide advice to the decision body on the basis of those results (clause 110(3)).

Under clause 111(1), a request to carry out a project audit or effects monitoring in relation to an "existing project" may, in turn, be made by the minister(s) or First Nation(s) that requested the review of the existing project under clause 95, to the extent and in the manner in which the request for review was made under clause 95(1) to (3). Where so requested, the executive committee must carry out the project audit or the effects monitoring and report the results to the minister or First Nation that made or that consented to the request. The executive committee may also include recommendations in its report (clause 111(2)). The relevant authority to which the report is submitted must give full and fair consideration to any recommendations that were made (clause 111(3).

Clause 112 and 113: Studies and Research

Upon the request of a specified authority, clause 112(1) authorizes the executive committee to undertake studies of the environmental or socio-economic effects that are cumulative geographically or over time, or to undertake research into any aspect of the assessment of activities. The authorities that may make such a request are:

- the DIAND Minister;
- the territorial minister or a First Nation, with the consent of the DIAND Minister; or
- the territorial minister or a First Nation, if they bear the expense.

The executive committee may conclude agreements with the requesting (or consenting) authority regarding the terms of reference, the scope and scheduling of the studies or research (clause 112(2)).

The executive committee must report the results of the study or research that it undertook to the relevant authority. It may also include recommendations in its report. These must be given full and fair consideration by the authority in question (clause 113).

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Clause 114: The Violation of a Decision Document

Where the Board considers that any person or body has violated any of the provisions contained in a decision document, it may recommend to the relevant decision body that a public hearing be held by the Board or another body designated by the decision body. Should the decision body accept the recommendation, a public hearing must be held with respect to the violation. The body that held the hearings (the Board or other designated body) may make recommendations to the decision body as to how the matter should be disposed of and the decision body must respond with written reasons to any recommendations so made (clause 114).

Clauses 115 and 116: Judicial Review

Clause 115 authorizes the Board to refer any question of law or jurisdiction arising from any proceedings under the Act to the Supreme Court of the Yukon Territory, if requested to do so by a designated office, the executive committee, a panel of the Board, a joint panel or a decision body.

Clause 116, in turn, authorizes specified parties to apply to the Supreme Court of the Yukon Territory for specified forms of relief against the Board, a designated office, the executive committee, a panel of the Board, a joint panel or a decision body. The parties entitled to seek relief are the Attorney General of Canada, the territorial minister or anyone directly affected by the matter for which the relief is sought. The forms of relief available are: an injunction, a declaration or an order in the nature of *certiorari*, *mandamus*, *quo warranto* or prohibition.

Clauses 117 to 121: Registers, Records and Public Access

Clause 117 requires the Board and each designated office to maintain the following records:

- a document indicating the boundaries of each assessment district and the location of the designation office for each such district;
- all rules and by-laws in force under the Act;
- the results of project audits and effects monitoring conducted under clauses 110 and 111;
- the reports of studies and research undertaken by the executive committee under clause 112; and

- descriptions of any standard mitigative measures developed under clause 37.

In addition, clause 118 requires the Board to maintain:

- a register containing all documents relating to assessments carried out by the executive committee, panels of the Board and joint panels, as well as the response provided by the government authority to a report filed under clause 91(1) regarding the examination of a project located on the Yukon North Slope;
- a list of all projects, existing projects, plans and other activities for which an assessment is pending or has been completed, together with information about their location and stage of assessment; and
- a record of all authorizations, grants of interest in land and funding that designated bodies provided under clause 89 to enable an approved project to proceed.

Each designated office, in turn, is required by clause 119 to maintain:

- a register containing all documents relating to assessments that it carried out or that were carried out by another body in its assessment district, as well as any documents provided to it under clause 91(1) regarding the examination of a project located on the Yukon North Slope; and
- a list of all projects, existing projects, plans (but not other activities) for which an assessment is pending or has been completed, together with information about their location and stage of assessment.

Under clause 120, any person is entitled to inspect the foregoing records and registers during normal business hours. Moreover, the Board and the designated offices must keep their records and registers in a manner that facilitates public access to them. Clause 121, however, precludes specified entities (the executive committee, the designated offices, panels of the Board and decision bodies) from disclosing the following information:

- traditional knowledge determined to be confidential under the applicable rules and provided in confidence for the purposes of the Act; and
- information that a government institution, within the meaning of the *Access to Information Act*, would not have to disclose pursuant to a request made under that Act by a person or body, unless:
  - the provider of the information consents to its disclosure; and
  - the person or body that requests the information is not required to disclose it pursuant to a request made under a territorial or First Nation law, and agrees to keep it confidential.

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Clauses 122 and 123: Regulations and Orders

Clause 122 supplements the regulation-making power in clause 47(1), which authorizes the Governor in Council to make regulations listing the activities that may be made subject to an assessment under the Act, as well as making exceptions from the activities so listed. Under clause 122, regulations may also be made:

- defining who is a Yukon "resident" for the purpose of appointing members to the Board under clause 9, removing them from office under clause 11(2) when they change their place of residence, and determining which member is to be removed if more than one of them changes residence during a given period;
- specifying additional matters to be considered in the assessment of a project or existing project under clause 42;
- specifying the projects for which proposals must be submitted to the executive committee, as opposed to a designated office, under clause 50(1));
- specifying timelines for the issuance of decision documents under specified clauses of the Act;
- specifying the manner in which the decision bodies must consult each other, where more than one of them is required to issue a decision document in relation to a given project;
- specifying the types of plans that may be reviewed by a panel of the Board under clause 105(1); and
- establishing a funding program to facilitate participation of specified classes of persons or groups in the review of projects.

The Standing House Committee on Aboriginal Affairs, Northern Development and Natural Resources had amended this clause to require that all regulations be reviewed by it before coming into force or being published in the *Canada Gazette*. The amendment, however, was eliminated by a vote of the House of Commons at Report Stage.

The Governor in Council is also empowered under clause 123 to make an order amending the Schedule under the Act, but only after the DIAND Minister has consulted the territorial minister and First Nations.

The Schedule consists of two parts. Part 1 lists the names of bodies empowered under any federal law, other than the *Yukon Act*, to issue authorizations whose terms and conditions are not subject to variation by the Governor in Council or a minister of the Crown. At present, the National Energy Board is the only body listed under Part 1.

Part 2, in turn, lists the names of bodies having the power under the *Yukon Act* to issue authorizations whose terms and conditions are not subject to variation by the Commissioner of Yukon or by a territorial minister. No body is currently listed under Part 2.

Under clause 123, the Governor in Council could make an order either adding the names of selected bodies to the list or removing their names from the list.

PART 3: TRANSITIONAL PROVISIONS, CONSEQUENTIAL AND COORDINATING AMENDMENTS AND COMING INTO FORCE

Transitional provisions are set out in clauses 124 and 125, which address the status of projects already being assessed under the 1984 *Environmental Assessment and Review Process Guidelines Order* or the *Canadian Environmental Assessment Act*, at the time that Part 2 of the bill (i.e., the assessment provisions) comes into force. Similarly, clause 126 deals with the status of projects coming under territorial or First Nations jurisdiction.

Clauses 127 to 131 make consequential amendments to the *Access to Information Act*, the *Privacy Act*, the *Yukon First Nations Self-Government Act* and the *Yukon Surface Rights Board Act*, whereas clauses 132 and 133 make coordinating amendments to selected provisions in the bill depending on the date upon which the bill, the *Courts Administration Service Act* or the *Yukon Act* (or selected provisions thereunder) are proclaimed in force or assented to.

Clause 134 provides that selected clauses, as well as Part 2 (the assessment provisions), of the bill are to come into force 18 months after the day on which the bill receives royal assent, or on any earlier day fixed by the Governor in Council.

Although clause 134 does not indicate when the balance of the bill is to come into force, section 6(2)(a) of the *Interpretation Act* provides that every Act that is not expressed to come into force on a particular day shall be construed as coming into force on the expiration of the day immediately before the day the Act was assented to in Her Majesty's name.

COMMENTARY

Of all the witnesses who testified before the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, the Council of Yukon First Nations (CYFN) was the only one to endorse Bill C-2 on behalf of

its members, except the White River First Nation. This First Nation disagreed with the CYFN that the legislation should go ahead at this time. In its opinion, it was essential that final agreements be concluded under the *Umbrella Final Agreement* before a new environmental assessment process was put in place in Yukon. The two other First Nations to testify, the Kwanlin Dun First Nation and Liard First Nation, which are not members of the CYFN, also had concerns about the legislation, as did the other witnesses who testified before the Committee.

A common complaint was the lack of meaningful consultations on the bill and the underlying *Umbrella Final Agreement.* Many witnesses felt that the consultation process had been inadequate and that their views had not been given sufficient consideration; as a result, the end product was flawed. Many also expressed concern about the extent of the consultations that would take place in the development of the regulations under the new Act, as well as the rules and by-laws that the Board and designated offices could or would have to make under clauses 30 to 38. Stressing the importance of such rules and regulations in defining the scope and the process for environmental assessments in Yukon, they urged much greater public involvement in the development of these key instruments than had been afforded in the development of the bill.

At least one witness characterized Bill C-2 as extremely complex. Others noted the legislation's inconsistencies, conflicts, flaws and ambiguities. Perceived shortcomings included:

- the bill's unclear interface with the *Canadian Environmental Assessment Act*, which would continue to apply in selected cases;
- the duplication of process in the Yukon North Slope which, because it also forms part of the Inuvialuit Settlement Region, would require assessments under both the new Act and the environmental assessment process established under the *Inuvialuit Final Agreement*;
- the possibility under the bill of assessing existing, as opposed to proposed, projects;
- the lack of timelines for completing the various steps in the assessment process;
- the potential for different assessment rules being promulgated by different designated offices, and the unclear working relationship between the different designated offices;
- the potential for conflict between multiple decision documents where more than one decision body is involved;
- the bill's failure to accord decision-body status to municipalities;

- **the lack of an effective enforcement mechanism in the bill to ensure compliance with the terms and conditions under which a project was given the go-ahead.**

Given the bill's perceived shortcomings, a number of witnesses felt that the legislation would breed uncertainty and might hamper much-needed economic development in Yukon.

One recommendation that garnered overwhelming support was the need for a five-year *statutory* review of the legislation. Pointing out that the five-year review mandated under section 12.19.3 of the *Umbrella Final Agreement* applied only to the parties to the agreement and thus did not guarantee the participation of all interested parties, the witnesses felt it imperative that the Act itself mandate a five-year review, as this would best ensure broad-based public involvement in assessing the new legislation's strengths and weaknesses.